UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NEW HARVEST CHRISTIAN FELLOWSHIP,

Plaintiff,

v.

CITY OF SALINAS,

Defendant.

Case No. 19-cv-00334-SVK

ORDER ON (1) MOTION FOR SUMMARY JUDGMENT OF DEFENDANT CITY OF SALINAS; (2) MOTION FOR SUMMARY JUDGMENT OF PLAINTIFF NEW HARVEST CHRISTIAN FELLOWSHIP; AND (3) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFF NEW HARVEST CHRISTIAN FELLOWSHIP

Re: Dkt. Nos. 28, 35, 41

Plaintiff New Harvest Christian Fellowship ("New Harvest") challenges zoning decisions by Defendant City of Salinas ("Salinas" or "the City") that New Harvest claims affect its ability to conduct a religious assembly on the ground floor of a building it purchased located at 344 Main Street in downtown Salinas (the "Beverly Building"). New Harvest alleges that the City's zoning code and denial of New Harvest's proposed use of the Beverly Building treat New Harvest on less than equal terms with nonreligious assemblies and substantially burden religious exercise, in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. Dkt. 1 at ¶¶ 53-63. The parties have consented to the jurisdiction of a magistrate judge. Dkt. 6, 12.

Both parties seek summary judgment on all claims. Dkt. 28, 35. The Court heard oral arguments on April 14, 2020. After considering the arguments at the hearing, the parties' submissions, the case file, and relevant law, the Court **DENIES** New Harvest's motion for summary judgment and **GRANTS** the City's motion for summary judgment.

I. BACKGROUND

The City's zoning code specifies a "Central City Overlay" district and, within that, a "Downtown Core Area." Dkt. 28-5 (Hunter Decl.) at ¶ 4 and Ex. C. Most of the Downtown Core Area is classified as "mixed use." *Id.* However, in 2006, the City amended its zoning code to include a prohibition on "[c]lubs, lodges, places of religious assembly, and similar assembly uses" on the ground floor of buildings facing Main Street in the 100 to 300 blocks of Main Street. *Id.* at ¶ 5 and Ex. C at 4 (Section 37-40.310(a)(2)). This three-block area lies within the larger Downtown Core Area. *Id.* at ¶ 4. For purposes of this order, the Court will refer to this zoning restriction as the "assembly uses provision" and will refer to the 100 to 300 blocks of Main Street as the "Main Street restricted area."

According to the City, the purpose of the assembly uses provision is "to stimulate commercial activity within the City's downtown, which had been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." *Id.* at ¶ 5. Aside from "normal [Conditional Use Permit] requirements," there is no restriction on assembly uses in the Downtown Core Area outside the three blocks of the Main Street restricted area, and there is no prohibition on assembly uses within the Main Street restricted area above the ground floor. *Id.*

New Harvest is part of a consortium of churches called New Harvest that is "like a denomination, but without a hierarchy of leadership" and has "beliefs [that] fall within the general stream of conservative, Evangelical, Pentecostal doctrine." Dkt. 36 (Torres Decl.) at ¶ 2. New Harvest currently operates from a rented facility in downtown Salinas located at 357 Main Street under a conditional use permit ("CUP") issued in 1994. *Id.* at ¶ 17; Dkt. 28-5 at ¶ 3. The CUP has been extended twice; the second extension was a three-year extension granted in June 2000. Dkt. 28-5 at ¶ 3. At the time of the last CUP extension, New Harvest told the City it did not intend to occupy 357 Main on a long-term basis, expected to be at the location for up to an additional three years, and was hoping to either buy a permanent building or build elsewhere. *Id.* at ¶ 3 and Ex. B at 2. Nevertheless, New Harvest has since continued to use the building at 357 Main Street as a "legal nonconforming use." *Id.* at ¶ 3.

New Harvest's weekly schedule of activities includes a Sunday morning worship service

(including a worship band) and programs for children and teens/tweens; a Tuesday evening worship service, "Fun Club" for children ages 3-4, and boys' ministries (which alternate weekly between two different age groups); a Thursday evening worship band rehearsal; a Friday evening prayer meeting; and a women's Bible study on some Saturday mornings. Dkt. 36 at ¶¶ 11-16. Some of the children's ministries take place in buildings near New Harvest's current location due to lack of space. *Id.* at ¶ 12. New Harvest has also had to discontinue its girls' ministry due to lack of space. *Id.* at ¶ 13.

In March 2018, New Harvest closed escrow on the purchase of the Beverly Building, which is located at 344 Main Street, within the Main Street restricted area. *Id.* at ¶ 21; Dkt. 1 at ¶ 27. In January 2018, New Harvest filed applications for a zoning code amendment and CUP to allow it to conduct worship services on the ground floor of the Beverly Building. Dkt. 28-5 at ¶ 7. At an August 2018 hearing, the City's Planning Commission voted to deny New Harvest's applications based on the assembly uses provision. *Id.* at ¶ 9 and Ex. E. New Harvest appealed the Planning Commission's decision to the City Council, which denied the appeal and approved the Planning Commission's decision on November 6, 2018, following a public hearing. *Id.* at ¶ 10 and Ex. F. On the same date, the City Council amended the definition of "religious assembly" in the assembly uses provision so that the definition did not include schools, day care centers, offices, or retail. *Id.* at ¶ 10 and Ex. G.

II. LEGAL STANDARD

Summary judgment is appropriate if the moving party shows that there is no genuine dispute as to any material fact and the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). A genuine dispute of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.*

The party moving for summary judgment bears the initial burden of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Where the party moving for summary judgment has the burden of persuasion at trial, such as where the moving party seeks summary judgment on its own claims or defenses, the moving party must establish "beyond controversy every essential element of its [claim]." *So. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (citation omitted). Where the moving party seeks summary judgment on a claim or defense on which the opposing party bears the burden of persuasion at trial, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party meets its initial burden, the burden shifts to the nonmoving party to produce evidence supporting its claims or defenses. *Id*. at 1103. If the nonmoving party does not produce evidence to show a genuine issue of material fact, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

"The court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1049 (9th Cir. 2014). However, the party opposing summary judgment must direct the court's attention to "specific, triable facts." *So. Cal. Gas*, 336 F.3d at 889. "[T]he mere existence of a scintilla of evidence in support of the plaintiff's position" is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *City of Pomona*, 750 F.3d at 1049-50 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

III. EVIDENTIARY ISSUES

A. Evidentiary objections

1. New Harvest's objections

New Harvest filed objections to the Declarations of Megan Hunter and Gregory R. Aker, which were submitted by the City in support of its summary judgment motion, under Federal Rule of Evidence 408 on the grounds that selected portions of those declarations refer to settlement

discussions. Dkt. 46. The evidence to which New Harvest objects concerns discussions between the City and New Harvest regarding possible modifications to the Beverly Building that would place commercial pedestrian-oriented activities on the ground floor facing Main Street and allow the church to hold worship services at the back portion of the ground floor. *Id.*[1]

New Harvest's evidentiary objections are **OVERRULED** on both procedural and substantive grounds. First, Civil Local Rule 7-3(a) requires that "[a]ny evidentiary and procedural objections to [a] motion must be contained within the [opposition] brief or memorandum." New Harvest's filing of a separate document containing evidentiary objections is in violation of this Civil Local Rule. Second, Federal Rule of Evidence 408, upon which New Harvest relies, states that evidence of settlement negotiations is not admissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction" but "[t]he court may admit this evidence for another purpose." Therefore, even assuming that the evidence to which New Harvest objects relates to settlement negotiations between the parties, the Court may consider that evidence for purposes other than the validity or amount of New Harvest's claim or as impeachment. Nevertheless, the evidence of alleged discussions between the City and New Harvest regarding possible modifications to New Harvest's proposed use of Beverly Building is not material to the Court's analysis of New Harvest's RLUIPA claims.

2. The City's objections

The City objects to the Declaration of Robert W. Burgess submitted by New Harvest in support of its motion for summary judgment. Dkt. 48 at 21-22. The City argues that the Court should exclude Mr. Burgess's testimony because: (1) New Harvest did not disclose Mr. Burgess by the expert witness disclosure deadlines in this case; (2) Mr. Burgess's testimony is lay opinion barred under Federal Rule of Evidence 701; and (3) Mr. Burgess's testimony violates the standard set forth in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 592 (1993), because it is "devoid of any explanation as to the 'reasoning' or 'methodology' used in reaching his conclusion." *Id.*

The City's objection to Mr. Burgess's declaration is **OVERRULED**. Although Mr.

[1] New Harvest's opposition to the City's summary judgment motion addresses this evidence notwithstanding the evidentiary objections. *See* Dkt. 45 at 6-7.

Burgess cannot testify as an expert in this case due to New Harvest's failure to disclose him, the declaration provides adequate foundation for the Court to consider Mr. Burgess as a fact witness concerning the current availability of other properties in Salinas.

B. Plaintiff's Request for Judicial Notice

New Harvest filed a request that the Court take judicial notice of several items. Dkt. 41. The City did not oppose the request for judicial notice.

The Court may judicially notice a fact that "is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993).

New Harvest seeks judicial notice of the articles of incorporation of Ariel Theatre. Dkt. 41 at 2. Articles of incorporation are subject to judicial notice. *In re Yahoo! Inc. Shareholder Deriv. Litig.*, 153 F. Supp. 3d 1107, 1117 (N.D. Cal. 2015). The remaining items in New Harvest's request for judicial notice are portions of the Salinas Zoning Code. Dkt. 41 at 2. Municipal ordinances are proper subjects of judicial notice. *Tollis Inc. v. City of San Diego*, 505 F.3d 935, 938 n.1 (9th Cir. 2007).

Accordingly, the Court **GRANTS** New Harvest's request that the Court take judicial notice to Exhibits 3-7 to the Declaration of Kevin Snider (Dkt. 40).

IV. DISCUSSION

RLUIPA was enacted "to protect the free exercise of religion guaranteed by the First Amendment from government regulation." *Guru Nanak Sikh Soc. Of Yuba County v. County of Sutter*, 456 F.3d 978, 985 (9th Cir. 2006). RLUIPA contains several provisions limiting government regulation of land use, referred to as: (1) the substantial burden provision, (2) the equal terms provision, (3) the nondiscrimination provision, and (4) the exclusions and limits provision. *See* 42 U.S.C. § 2000cc; *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1169 and n.24 (9th Cir. 2011). In this case, New Harvest asserts claims under RLUIPA's substantial burden and equal terms provisions. Dkt. 1 at ¶¶ 53-63. Each party seeks summary judgment on both of New Harvest's RLUIPA claims and agrees that this case can

properly be resolved on summary judgment. Dkt. 28, 35.

A. Substantial Burden Claim

A government land use regulation that imposes a substantial burden on the religious exercise of a religious assembly or institution is unlawful under RLUIPA "unless the government demonstrates that imposition of the burden … is in furtherance of a compelling government interest; and is the least restrictive means of furthering that compelling government interest." *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066 (9th Cir. 2011) (quoting 42 U.S.C. § 2000cc(a)(1)). The plaintiff bears the burden of persuasion as to whether the City zoning ordinance, or the City's application of that ordinance to the plaintiff, "substantially burdens" the plaintiff's exercise of religion. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004). Even if the plaintiff establishes a *prima facie* case of violation of RLUIPA such that the burden shifts to the government, the burden of establishing "substantial burden" remains with the plaintiff. *Centro Familiar*, 651 F.3d at 1171 (citing 42 U.S.C. § 2000cc-2(b)).

The City does not dispute that New Harvest is a religious assembly or institution. *See* Dkt. 28. RLUIPA provides that "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." 42 U.S.C. § 2000cc-5(7)(B). The activities that New Harvest seeks to conduct at the Beverly Building include religious assemblies. *See* Ex. F to Dkt. 28-5 at 1. Such activities constitute a "religious exercise" within the meaning of RLUIPA's substantial burden provision. *See* 42 U.S.C. § 2000cc-5(7)(A) (defining "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief").

The Court next considers whether the City's zoning decisions have imposed a substantial burden on the religious exercise of New Harvest. The Court's analysis under the substantial burden provision "proceeds in two sequential steps." *Foursquare Gospel*, 673 F.3d at 1066. "First, the plaintiff must demonstrate that a government action has imposed a substantial burden on the plaintiff's religious exercise." *Id.* "Second, once a plaintiff has shown a substantial burden,

the government must show that its action was 'the least restrictive means' of 'further[ing] a compelling government interest.'" *Id.* (citation omitted). Thus, the Court must first find that the disputed regulation creates a "substantial burden" before reaching the question of "compelling interest." Whether a land use regulation imposes a substantial burden is a question of law. *See id.; see also Livingston Christian Schools v. Genoa Charter T'ship*, 858 F.3d 996, 1001 (6th Cir. 2017).

The Ninth Circuit has held that "for a land use regulation to impose a substantial burden, it must be oppressive to a significantly great extent"; in other words, "a substantial burden on religious exercise must impose a significantly great restriction or onus upon such exercise." *San Jose Christian College*, 360 F.3d at 1034 (internal quotation marks and citations omitted). Three key factors in determining "substantial burden" are (1) feasible alternative; (2) uncertainty, delay, expense; and (3) Plaintiff's own actions. *See Foursquare Gospel*, 673 F.3d at 1068; *Spirit of Aloha Temple v. County of Maui*, 322 F. Supp. 3d 1051, 1065 (D. Hawai'i 2018) (citing *Livingston Christian Schools*, 858 F.3d at 1004).

1. Feasible alternatives

In evaluating whether a land use regulation imposes a substantial burden, the availability of feasible alternatives to the property affected by the challenged land use regulation is a relevant consideration under Ninth Circuit law. For example, the Ninth Circuit affirmed a district court's entry of summary judgment in favor of a city on a college's RLUIPA substantial burden claim where "there is no evidence in the record demonstrating that College was precluded from using other sites within the city." *San Jose Christian College*, 360 F.3d at 1035-36. By contrast, the Ninth Circuit affirmed summary judgment in favor of a religious organization on its RLUIPA substantial burden claim where a county denied of the organization's applications for a conditional use permit on two different properties, finding that "[t]he net effect of the County's two denials … is to shrink the large amount of land theoretically available to [the religious organization] under the Zoning Code to several scattered parcels that the County may or may not ultimately approve." *Guru Nanak Sikh Soc.*, 456 F.3d at 991-92

A case that illustrates the significance of feasible alternatives to the substantial burden

analysis is *Victory Center v. City of Kelso,* which involved a zoning regulation that, similar to the regulation in this case, sought to encourage pedestrian-oriented retail activity on the street level within a four-block subarea of the city's "Commercial Town Center." No. 3:10-cv-5826-RBL, 2012 WL 1133643, at *1 (W.D. Wash. Apr. 4, 2012). A Washington district court granted summary judgment in favor of the city on a religious organization's RLUIPA substantial burden claim, finding that city's zoning regulations "do not impose a substantial burden of the Victory Center's religious exercise because the Victory Center is free to locate its facility anywhere outside the [Commercial Town Center] flour-block subarea dedicated to pedestrian retain activity" or even "within this subarea anywhere above the first floor." *Id.* at *4. The court noted that "[t]he city estimates that the restricted area represents less than one eighth of one percent of zoned land within the city limits" and "locating outside of this small area does not substantially impede the Victory Center's ability to practice religious activities," particularly where "the Victory Center has not presented any evidence that the [location at issue] bears any religious significance … and any burden imposed by the [] land use restrictions is merely a matter of personal or economic convenience." *Id.*

It appears to be undisputed that New Harvest's current location at 357 Main Street is not a feasible alternative. In addressing other sites, both parties submit evidence in the form of declarations regarding the availability of alternatives. New Harvest submits the declaration of Robert W. Burgess, a licensed commercial real estate broker who is familiar with commercial properties in the City. Dkt. 38 (Burgess Decl.) at ¶¶ 1-3. Mr. Burgess states that as of the date of his declaration (February 18, 2020), only three of the 24 locations advertised for sale were in "the size range that might be considered." *Id.* at ¶ 5. Mr. Burgess indicates that two of the three properties are leased investments that were occupied and for which New Harvest would act as a landlord. *Id.* The third location is a 14,700 square foot church offered for sale at $2345,000 ($160 per square foot). *Id.* That property is located at 747 El Camino Real, nine miles north of Main Street, and can be reached by driving north from Salinas on Highway 101 North and making a U-turn on the highway to reach the property via Highway 101 South. *Id.;* Dkt. 48-1 at Ex. E.

The City has presented evidence that New Harvest told the City at least as early as June

2000 that it was looking for a new location. Dkt. 28-5 at ¶ 3 and Ex. B at 2. The City submits the declaration of Dean Chapman, a consulting expert in the field of appraised value of commercial or residential real property and other real estate matters. Dkt. 48-3 (Chapman Decl.) at ¶ 2. Mr. Chapman states that based on his review of public records for the period 2012 to 2019, he identified the sales of nine churches and other properties with square footage suitable to house New Harvest's religious worship and other activities and within or close to its price range. *Id.* at ¶ 4 and Ex. B. The City has also presented evidence that it has denied only one of over 100 conditional use permit applications submitted by churches over the past fifty years. Dkt. 28-5 at ¶ 12. Meanwhile, according to Pastor Torres, who testified as New Harvest's Rule 30(b)(6) designee, New Harvest considered only two properties between 2003 and its purchase of the Beverly Building in 2018: one property was unavailable because it was zoned industrial, and New Harvest did not submit a purchase offer for the second because Pastor Torres was out of the country. Ex. A to Dkt. 48-1 at 78:13-81:13.

New Harvest has not presented any evidence to counter the City's evidence of feasible alternative locations. Notably, the evidence submitted by New Harvest focuses only on church locations available at present, even though by its own admission has been considering a move for many years. Dkt. 28-5 at ¶ 3 and Ex. B at 2 (minutes of June 2000 Planning Commission meeting at which New Harvest's attorney stated that New Harvest "may need to be [at its current location] another three years, as they are hoping to either buy a permanent building or build elsewhere"); *see also* Dkt. 36 at ¶ 20 (statement by Pastor Torres that New Harvest "looked for years at commercial properties to buy or lease within Salinas."). As to the one presently-available church property identified by New Harvest, New Harvest does not establish any reason why that property would not be a feasible alternative. The fact that any church members coming from the direction of downtown Salinas would have to make a U-turn does not establish that the location is unsuitable. Moreover, New Harvest has failed to offer any evidence as to (1) other properties (not currently configured as a church) that are available at present, (2) other properties that were available in relevant past years, or (3) other properties that are expected to become available in the future.

Even without evidence concerning specific available properties, such as that presented by the City in this case, courts in this circuit have rejected substantial burden claims based on the religious organization's ability to relocate elsewhere. *See, e.g.*, *Victory Center*, 2012 WL 1133643, at *4 (granting summary judgment to city on undue burden claim under RLUIPA where plaintiff was free to locate its facility anywhere outside the four-block area affected by the disputed zoning ordinance); *see also Daniel and Francine Scinto Found'n v. City of Orange*, No. SA CV 15-1537-DOC (JCGx), 2016 WL 4150453, at *11 (C.D. Cal. 2016) (denying plaintiff's motion for summary judgment on RLUIPA undue burden claim where plaintiff did not cite anything indicating it was precluded from carrying out its religious mission or religious activities at other locations).

Accordingly, the availability of alternative locations is evidence that that the City's zoning restrictions that apply to the Church's desired operations at the Beverly Building do not constitute a substantial burden.

2. Uncertainty, delay, and expense

Where the alternative locations require substantial delay, uncertainty, or expense, a substantial burden may exist. *Foursquare Gospel*, 673 F.3d at 1068. The only evidence New Harvest has presented on this point is that the alternative location identified by Mr. Burgess would require people travelling from the direction of downtown Salinas to make a U-turn. Dkt. 38 at ¶ 5; Ex. E to Dkt. 48-1. As discussed above, New Harvest has failed to demonstrate why this fact renders the alternative location substantially burdensome. Thus, New Harvest has failed to show that the City's zoning actions subject it to substantial delay, uncertainty, or expense that might constitute a substantial burden.

3. New Harvest's own actions

The City presents evidence that New Harvest was aware at the time it bought the Beverly Building that it was not zoned for assembly uses on the ground floor and that the City would oppose the church's efforts to conduct religious services there. Ex. A to Dkt. 28-1 at 153:6-155:19; Ex. D to Dkt. 28-5 at 17:19-18:12; *see also* Dkt. 1 at ¶¶ 31, 33. The City argues that a self-imposed burden is not a substantial burden under RLUIPA and that thus New Harvest cannot

prevail on its substantial burden claim because New Harvest purchased the Beverly Building without a reasonable expectation of being allowed to use that property for its intended religious purposes. *See* Dkt. 28 at 13-14 (citing *Livingston Christian Schools*, 858 F.3d at 1004; *Andon, LLC v. City of Newport News, Va.*, 813 F.3d 510, 515 (4th Cir. 2016); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007)).

New Harvest argues that "[i]n this jurisdiction, it is not an affirmative defense to any of RLUIPA's four provisions that a religious institution acquired property 'without a reasonable expectation of being able to use that land for religious purposes.'" Dkt. 45 at 3 (citing City's motion for summary judgment at 12). New Harvest notes that the authorities cited by the City in support of its self-imposed burden argument are from other circuits. Dkt. 45 at 2-3. New Harvest also cites several cases from the Ninth Circuit and courts within the circuit in which churches prevailed despite apparently purchasing properties prior to permit approval and with knowledge of zoning restrictions. *Id* at 3-4 and cases cited therein.

The Court is not persuaded by New Harvest's argument. None of the in-circuit cases it cites rejected or even discussed the self-imposed burden doctrine followed in other circuits. In fact, at least one district court within the Ninth Circuit recently relied on the self-imposed burden doctrine (as articulated in *Livingston Christian Schools* and other out-of-circuit authorities cited by the City) in evaluating a claim of substantial burden under RLUIPA. *See Spirit of Aloha Temple v. County of Maui*, 322 F. Supp. 3d at 1065. Under these circumstances, the Court is free to look to other circuits for guidance, and the Court finds the cases cited by the City persuasive on this point.

New Harvest's own actions in buying the Beverly Building when it knew that it was not zoned for ground floor assemblies and having been expressly informed that the City would oppose the church's efforts to conduct religious services on the ground floor is evidence that the City's actions do not impose a substantial burden within the meaning of RLUIPA.

4. Conclusion on substantial burden claim

New Harvest's substantial burden argument is that the City's zoning restriction denies New Harvest the use of one suitable space and thus constitutes a substantial burden on the exercise of its religious beliefs. *See* Dkt. 35 at 18-19; Dkt. 50 at 5-6. At its core, this is an argument that

churches are exempt from zoning restrictions. That is not the law. *See, e.g.*, *San Jose Christian College*, 360 F.3d at 1035 (affirming summary judgment for city on RLUIPA substantial burden claim because "while the [City's] ordinance may have rendered [the religious institution] unable to provide education and/or worship at the Property, there is no evidence in the record demonstrating that [the religious institution] was precluded from using other site within the city" nor "any evidence that the City would not impose the same requirements on any other entity").

Applying the proper legal standards and considering the record as a whole—including evidence regarding the availability of feasible alternative locations; the absence of evidence concerning uncertainty, delay, and expense to New Harvest associated with those alternative locations; and evidence that the burden of which New Harvest complains is self-imposed—the Court concludes that New Harvest has not carried its burden of demonstrating that the City's actions have imposed a substantial burden on New Harvest's religious exercise. *See Foursquare Gospel*, 673 F.3d at 1066. Accordingly, New Harvest's motion for summary judgment on its substantial burden claim is **DENIED** and the City's motion for summary judgment on that claim in **GRANTED.**

B. Equal Terms Claim

Under RLUIPA's equal terms provision, governments are prohibited from imposing land use restrictions on a religious assembly "on less than equal terms" with a non-religious assembly. *Centro Familiar*, 651 F.3d at 1169 (citing 42 U.S.C. § 2000cc(b)). To succeed on a claim under the equal terms provision, the claimant must demonstrate four elements: (1) an imposition or implementation of a land use regulation, (2) by a government, (3) on a religious assembly or institution, (4) on less than equal terms with a nonreligious assembly or institution. *Id.* at 1170-71. In analyzing a claim under the equal terms provision, courts examine whether a government regulation subjects religious and secular assemblies or institutions that are "similarly situated with respect to an accepted zoning criteria" to different land use treatment. *See id.* at 1173; *see also Corp. of the Catholic Archbishop of Seattle v. City of Seattle*, 28 F. Supp. 3d 1163, 1167 (W.D. Wash. 2014). If a religious institution demonstrates all four prongs of an equal terms claim, the burden of proof shifts to the government on all elements. *Centro Familiar*, 651 F.3d at 1171

(citing 42 U.S.C. § 2000cc-2(b)).

1. Facial violation

Section 37-40.310(a)(2), (3) does not, on its face, establish a *prima facie* violation of RLUIPA's equal terms provision. Such a violation has been found where, for example, a city code allowed secular membership organizations as of right but required religious organizations to obtain a conditional use permit. *See Centro Familiar*, 651 F.3d at 1175. By contrast, the text of Salinas's zoning provision treats secular and religious places of assembly the same: neither are allowed on the ground floor in the Main Street restricted area. Section 37-40.310(a)(2) ("Assembly and Similar Uses. Clubs, lodges, places of religious assembly, and similar assembly uses shall only be permitted above the ground floor of buildings facing Main Street within the downtown core area."). As such, New Harvest has failed to demonstrate that the assembly uses provision, on its face, violates RLUIPA's equal terms provision. *See Calvary Chapel Bible Fellowship v. County of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020).

New Harvest also argues that Salinas's zoning ordinance violates the equal terms provision because it allows "live entertainment" in the form of "musical, theatrical, dance, karaoke, cabaret or comedy act" in secular venues but not religious assemblies within the Main Street restricted area. Dkt. 35 at 10-11 (citing Zoning Code Section 37-40-.310(a)(3)(A)). This argument overlooks the fact that these six types of entertainment are permitted in the Main Street restricted area only as *accessory uses* to a permitted underlying principal use, such as a restaurant, art gallery, music studio, or food and beverage sales establishment. *See* Ex. C to Dkt. 28-5 at Section 37-40.310(a)(3). On its face, this accessory use provision is neutral as to content, allowing both religious and secular music and other entertainment as accessories to otherwise-permitted uses. Thus, the existence of the accessory uses provision also does not establish a facial violation of RLUIPA's equal terms provision.

2. "As applied" violation

Turning to the question of whether the City's application of its zoning ordinance violates RLUIPA's equal terms provision, the Court views the key inquiry to be as set forth in *Centro Familiar*: the City violates the equal terms provision only when a church is treated on less than

equal basis with a secular comparator, similarly situated with respect to accepted zoning criteria, such as "parking, vehicular traffic, and generation of tax revenue." *See Centro Familiar*, 651 F.3d at 1173 (citing *River of Life Kingdom Ministries v. Village of Hazel Crest*, 611 F.3d 367, 373 (7th Cir. 2010) (en banc)).

a. Accepted zoning criteria

The goal of the City's assembly uses provision is "to stimulate commercial activity within the City's downtown, which had been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." Dkt. 28-5 at ¶ 5; *see generally* Dkt. 40-2 at 20:13-22 (deposition testimony of Megan Hunter that focus in downtown core area is on "creating a special entertainment oriented mixed use district with residential above the ground floor stories where you have a lot of excitement, vibrancy …"); Ex. C to Dkt. 28-5 at Section 37-40.290 (defining "Purpose" of central city overlay regulations to include "(a) Encourag[ing] and accommodat[ing] the increased development intensity for mixed use, commercial, retail, and office uses within the central city … (c) Promot[ing] live entertainment uses in the downtown core area of the city ..; and (3) Encourag[ing] pedestrian-oriented neighborhoods where local residents and employees have services, shops, entertainment, jobs, and access to transit within walking distance of their homes and workplace.").

Similar goals have been regarded as accepted zoning criteria. *See Centro Familiar*, 651 F.3d at 1172-73 (identifying accepted zoning criteria to include parking, vehicular traffic, and generation of tax revenue); *Victory Center*, 2012 WL 1133643, at *6 (considering whether religious organization was treated on less than equal terms than similar secular institutions with respect to zoning ordinance that sought to encourage pedestrian-oriented retail activity on the street level within a four-block subarea of city center); *see also River of Life*, 611 F.3d at ("If the reasons for excluding some category of secular assembly—whether traditional reasons such as effect on traffic or novel ones such as creating a 'Street of Fun" … —are applicable to a religious assembly, the ordinance is deemed neutral and therefore not in violation of the equal terms provision").

Accordingly, the Court finds that the City's accepted zoning criteria are "to stimulate

commercial activity within the City's downtown, which had been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." *See* Dkt. 28-5 at ¶ 5.

b. Main Street theaters and cinemas

The Court must next consider whether the assembly uses provision treats New Harvest on a less than equal basis with similarly situated secular comparators with respect to the City's zoning criteria. New Harvest identifies the following four uses within the Main Street restricted area as relevant comparators: Maya Cinema, El Rey Theater, Fox Theater, and Ariel Theatre. Dkt. 35 at 5-6, 12. According to New Harvest, these four properties are "similarly situated secular comparators with respect to the zoning criteria." *Id.* at 12. New Harvest characterizes the four uses as "secular assemblies." *Id.* New Harvest's arguments and evidence regarding the operations of the four cinemas/theaters, which focus on seating capacity, are as follows:

- **Maya Cinema:** New Harvest states that this cinema is a "modern facility which shows first run films" in "14 theater rooms, all located on the ground floor" with one theater room seating 177, one seating 144, and the rest seating 44 persons. Dkt. 35 at 6; *see also* Dkt. 42 (Andrews Decl.) at ¶ 3.
- **El Rey Theater:** New Harvest states that this theater had 800 seats when it opened in 1935, currently has a seating capacity of 400 on the main floor. Dkt. 35 at 6; Dkt. 36 at ¶ 17; Dkt. 40-8. According to New Harvest, this theater has sat vacant for a number of years but has recently been sold. Dkt. 35 at 6.
- **Fox Theater:** New Harvest describes this property as a "multi-purpose venue" that "hosts weddings, quinceneras, business conferences, live music concerts, live comedy shows, and banquets." Dkt. 35 at 6. According to New Harvest, the building has multiple meeting rooms located on the first and second floors and advertises rentals of its facilities with banquet seating for 350 and wedding ceremony seating for over 500 persons. *Id.*; *see also* Dkt. 36 at ¶ 18.
- **Ariel Theatre:** New Harvest states that this is a venue with a capacity of 289 persons that houses a non-religious children's theater program where children and youth perform in large stage productions on Fridays and Saturdays and where

classes for children are offered. Dkt. 35 at 5-6; *see also* Dkt. 37 (Palacio Decl.) at ¶ 4.

The City argues that these uses are not relevant secular comparators to New Harvest because each promotes the City's accepted zoning criteria:

> They are open to the general public. Their doors are open regularly and for extended periods throughout the week. They draw tourists and City residents who are seeking leisure or entertainment. Their windows and doors are large and open to the street, promoting foot traffic and personal safety. They form the backbone of Main Street's commercial activity. Unlike private clubs and churches, cinemas and theatres support *all* of the City's regulatory purposes.

Dkt. 48 at 9 (emphasis in original).

To evaluate a RLUIPA equal terms claim, the Court must identify the "objective criteria addressed in the [challenged] code section" and evaluate whether the disallowed religious use is similarly situated to "any secular comparator permitted in, not excluded from, the zone." *Archbishop of Seattle*, 28 F. Supp. 3d at 1169 (citing *Centro Familiar*, 651 F.3d at 1174). According to expert testimony regarding city planning submitted by Salinas, which New Harvest does not refute, "[i]n the city planning field, it is well known that private assembly-type uses … detract from a city's efforts to promote a vibrant, pedestrian-friendly downtown" because such uses are "typically open only to organization members, operate during limited hours, generate limited interest among the general public, and typically have 'blank facades.'" Dkt. 28-2 (Aknin Decl.) at ¶ 6. By contrast, "movie theatres, nightclubs, restaurants, bars and other entertainment venues … tend to attract far greater numbers of pedestrians to a city's downtown, again encouraging increased commercial activity and a vibrant downtown atmosphere" because such uses "are generally open more days of the week and hours of the day, including evenings and weekends, are freely open to the general public, attract [a] far greater number of people into a downtown area, and generate interest among city residents, residents from nearby communities, and tourists to a far greater extent than do private clubs or churches." *Id.* at ¶ 7, Ex. A.

With regards to New Harvest's proffered comparators, New Harvest has failed to show that the Maya Cinema or Fox Theater are relevant comparators. While the seating capacity of the Maya Cinema and Fox Theater may be similar to New Harvest's proposed use of the Beverley

Building, New Harvest's own evidence establishes that these properties, unlike New Harvest, offer numerous activities throughout the week that would reasonably be expected to attract the general public, such as first run films, weddings, concerts, comedy shows, and other events. By contrast, New Harvest offers no evidence that its activities actually draw any non-members, and no evidence that its activities have a positive impact on commercial activity or vibrancy within the Main Street restricted area.

Similarly, New Harvest has failed to establish that the El Rey Theater is a relevant comparator. The *only* evidence presented by New Harvest regarding the El Rey Theater is its seating capacity, both currently (400 seats on the ground floor) and when the theater opened in 1935 (800 seats). Dkt. 35 at 6; Dkt. 36 at ¶ 17; Dkt. 40-8. However, this capacity information provides no basis for comparing the operations of the El Rey Theater to New Harvest's proposed use of the Beverly Building with respect to the City's zoning criteria of stimulating commercial activity and vibrancy in the Main Street restricted area.

The evidence concerning the Ariel Theatre is more extensive and suggests more parallels with the proposed operations of New Harvest, in that the theater is currently in use and appears to offer shows mainly on weekends. However, there is also evidence in the record that schools use the theater, which indicates weekday activities at the property. Dkt. 40-2 at 38:10-13 (testimony of Salinas Community Development Director Megan Hunter that "both the Fox Theater and Ariel Theater have a lot of schools that use their facilities so they have a lot of activity there"). Moreover, there is evidence that rehearsals and classes also occur at that theater, which suggests that participants (and their parents) visit the theater area throughout the week. *Id.* at 43:9-10 (testimony of Megan Hunter that Ariel Theater has classes and "rehearsals, and other things that they do there."). This evidence establishes that the Ariel Theater is not similarly situated to New Harvest's proposed use of the Beverly Building with respect to the accepted zoning criteria, which include fostering an active and vibrant Main Street.

Based on the evidence in the record concerning the particular Main Street cinemas and theaters identified by New Harvest, the Court concludes that these properties are not "similarly situated" to New Harvest's proposed use of the Beverly Building with respect to the City's zoning

criteria, which seek "to stimulate commercial activity within the City's downtown, which had been in a state of decline, and to establish a pedestrian-friendly, active and vibrant Main Street." *See* Dkt. 28-5 at ¶ 5. Accordingly, the permitting of theaters and cinemas within the Main Street restricted area does not establish a *prima facie* violation of RLUIPA's equal terms provision.

c. Other uses in Downtown Core Area

New Harvest also cites the following actual or permitted uses within the Downtown Core Area as evidence in support of its RLUIPA equal terms claim: nursing homes, hospitals, and residential care facilities; cemeteries; and government offices such as a post office, city hall, and police stations. Dkt. 35 at 15-16. New Harvest argues that such uses "are not conducive to an exciting and vibrant downtown which pulls in foot traffic." *Id.* at 15. However, New Harvest has not offered any evidence that the City has permitted such uses within the Main Street restricted area. The actual or permitted existence of such facilities within the larger Downtown Core Area does not support New Harvest's contention that the City's restriction of religious assemblies within the three-block Main Street restricted area treats religious organizations differently than secular organizations within that area.

V. CONCLUSION

For the reasons discussed above, the Court **ORDERS** as follows:

1. New Harvest's evidentiary objections (Dkt. 46) are **OVERRULED.**
2. The City's evidentiary objections (Dkt. 48 at 21-22) are **OVERRULED.**
3. New Harvest's request for judicial notice (Dkt. 41) is **GRANTED.**
4. New Harvest's motion for summary judgment (Dkt. 35) is **DENIED.**
5. The City's motion for summary judgment (Dkt. 28) is **GRANTED**.

SO ORDERED.

Dated: May 29, 2020

SUSAN VAN KEULEN
United States Magistrate Judge